In the Supreme Court of the United States

OCTOBER TERM, 1924

ANDREW W. MELLON, SECRETARY OF THE Treasury of the United States, and Frank White, Treasurer of the United States, appellants, *v.* THE ORINOCO IRON COMPANY	No. 491

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM

The motion to dismiss should be denied.

It is based upon the theory that the appeal of the Secretary of the Treasury and the Treasurer of the United States, taken under the authorization of the Department of Justice, is "frivolous" and was taken for purposes of delay.

I assume that this Court will be slow to impute either frivolity or mere dilatory motives to responsible officers of the Government.

That the question involved in the case is debatable is shown by the fact that the learned Court of Appeals

was divided on the question now remaining for decision, and even a cursory reading of the opinion of the dissenting judge (Judge Smith) will indicate that the contention of the Government, even if it be erroneous, can hardly be regarded as "frivolous," nor is it dilatory, for the Government is little concerned with the amount involved but is very much concerned with the propriety of the procedure which was followed by the appellee in this case.

Very briefly stated, the facts are these:

An American corporation, the Orinoco Company, Ltd., had a claim against the State of Venezuela for damages due to injuries inflicted upon it in Venezuela in the course of a revolution in that country. Our Department of State made a claim against Venezuela and finally a protocol was signed between the United States and Venezuela, whereby Venezuela agreed to pay the claim to the United States. When this payment was made into the Treasury of the United States a controversy arose between the Receiver of the Orinoco Company, Ltd., who had been appointed by a Minnesota State Court, and another company called The Orinoco Iron Company (the present appellee) as to which was the owner of the fund.

Congress had provided in a general statute as to the disposition of moneys which the United States might receive from foreign nations in behalf of its nationals.

By the Act of February 27, 1896, c. 34, 29 Stat. 28, 32, it was provided:

> Hereafter all moneys received by the Secretary of State from foreign governments and other sources in trust for citizens of the United States or others, shall be deposited and covered into the Treasury.
>
> *The Secretary of State shall determine* the amounts due claimants, respectively, from each of such trust funds, and *certify* the same to the Secretary of the Treasury, who shall, *upon the presentation of the certificates of the Secretary of State*, pay the amounts so found to be due.
>
> Each of the trust funds covered into the Treasury as aforesaid is hereby appropriated for the payment *to the ascertained beneficiaries* thereof of the certificates herein provided for. (Italics ours.)

It is apparent that the United States in collecting money from foreign nations for its nationals left it to the determination of the Secretary of State to distribute such funds, so far as any obligation of the United States was concerned. The Secretary of the Treasury and the Treasurer of the United States under the provisions of this Act were entitled to the protection of a certificate of the Secretary of State before making any payments.

Both the Minnesota receiver of the Orinoco Company, Ltd., and the Orinoco Iron Company thereupon applied to the Secretary of State for the certificate required by the Act. The State Department decided

that it could not determine an equitable interest in the fund and that it could only issue its certificate to the party in whose behalf it had made the claim against Venezuela.

Accordingly the Secretary of State issued two certificates, dated August 12, 1912, and May 5, 1917, requiring the Treasury Department to pay the fund in question to the Minnesota receiver of the Orinoco Company, Ltd.

Thereupon the Orinoco Iron Company brought this suit in the Supreme Court of the District of Columbia to determine the question of equitable ownership. In so far as the suit was brought against the Orinoco Company, Ltd., and its receiver, it may have been proper, if it had jurisdiction over these defendants, but the bill further asked and the court so ordered that the Secretary of the Treasury and the United States Treasurer, who were also made defendants, be enjoined from making any payment to the beneficiary named in the certificate and only to a receiver, to be appointed by the Supreme Court of the District of Columbia. Such receiver was appointed to hold the money until the Supreme Court of the District determined its true ownership.

The Supreme Court of the District of Columbia subsequently decided that the Orinoco Iron Company was the equitable owner of the fund and enjoined the Secretary of the Treasury and the United States Treasurer from making any payment to the Minnesota receiver of the Orinoco Company, Ltd., in whose favor the certificate of the Secretary of State had been issued.

On appeal to the Court of Appeals of the District of Columbia that court agreed that the Orinoco Iron Company was the equitable owner of the fund. The majority of the court also agreed that it had the power to enjoin the Treasury Department from making any payment under the certificate of the Secretary of State, but one member of the court (Mr. Justice Smith) dissented on the ground that, however clear the jurisdiction of the Supreme Court of the District was to determine the equitable ownership of the fund as between the two claimants, it had no jurisdiction to enjoin the Treasury Department from making payment under the Act of Congress already quoted.

Thereupon the Minnesota receiver of the Orinoco Company, Ltd., and the Secretary of the Treasury and the United States Treasurer took separate appeals, but the appeal of the receiver was dismissed for failure to docket it seasonably.

Thus the only appeal now before this Court is the appeal of the Secretary of the Treasury and the United States Treasurer.

It is therefore clear that as between the Orinoco Company, Ltd., and the Orinoco Iron Company it has been finally determined that the equitable owner of this fund is the Orinoco Iron Company, but this leaves the procedural question still open whether, in a controversy between two owners of a fund, the United States can be dragged in and its officials enjoined in a proceeding of this character, especially where Congress has itself provided a method of distributing these funds and in so doing has made the

Secretary of State the determining factor as to whom the United States will make payment. It also raises the question whether, when the Secretary of State has issued a certificate in favor of a receiver, appointed by a Minnesota State Court, the Treasury Department can be compelled by the Supreme Court of the District of Columbia to pay to its receiver. Was not the act of Congress intended to prevent such conflicts in jurisdiction so far as any obligation of the United States was concerned?

If the power of the Secretary of State to determine *as between the United States and any claimant* the form of payment can be thus disregarded, then, as the dissenting opinion indicates, any claimant, without awaiting the action of the Secretary of State, could ask for a mandamus to compel the Treasury Department to pay a sum, even though the United States, as in the instant case, had made the collection from a foreign nation in behalf of some other party. Thus the United States would not only be dragged into all kinds of litigation but the method of paying out such Treasury trust funds would be embarrassed by injunctions and mandamuses *and the determinative power of the Secretary of State would be nullified.*

Evidently Congress by the Act of 1896 intended that so far as the United States is concerned it would not be involved in private litigation about the ownership of such *quasi*-trust funds, and that, so far as the liability of the United States to distribute such trust funds was concerned, the question should rest with the Secretary of State to determine to whom the

United States would pay it, and then leave rival claimants to fight out their quarrels in the courts without embarrassing the Government.

If the United States compels a foreign nation to pay money, the disposition of that money is primarily a question for the United States, even though it owe a *moral* duty to distribute the fund to the parties in whose favor the claims were made against the foreign nation. Thus France in 1833 paid into the Treasury of the United States $5,000,000 in what are known as the "French spoliation claims," and these sums were never paid out to the various claimants for many decades thereafter. That the United States owes a *moral* duty to its citizens in the matter can not be questioned, but it may be questioned whether it is a duty which is enforceable in the courts.

At all events, Congress in collecting the money has a right to say that, so far as any liability of the United States is concerned to distribute it among those entitled to it, that this obligation of the United States will be fully met by the decision of the Secretary of State as to the manner of such distribution. Such certificate does not *judicially* determine its true ownership. It simply discharges the governmental obligation of distribution, leaving rival claimants to litigate for themselves.

Unless other claimants to this fund shall appear, the Secretary of State, in view of the decision of the Court of Appeals, may decide to cancel the certificate which he issued in favor of the receiver of the Orinoco Company, Ltd., and to issue a new certificate to the

asked that a certificate of the Secretary of the Treasury should be the prerequisite to any increase? To make the [illegible], the [illegible] proceed upon in the [illegible] [illegible] should [illegible] provided that the [illegible] should be paid [illegible] the Secretary [illegible] in the [illegible] of [illegible] when the Secretary of State [illegible] that such [illegible] was [illegible] [illegible] In the first [illegible] nothing [illegible] and the [illegible] [illegible] [illegible] a [illegible] [illegible]

In the [illegible] case, [illegible] the [illegible] upon the [illegible] [illegible] [illegible] [illegible]

[illegible]

[illegible] M. [illegible]

[illegible]

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No. 491, October Term, 1924.

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MOTION OF APPELLEE TO DISMISS OR AFFIRM.

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MOTION OF APPELLEE TO DISMISS OR AFFIRM.

Now comes the Orinoco Iron Company, appellee, and moves the court to dismiss this appeal or affirm the decree below, with interest and costs.

STATEMENT OF CASE.

This suit concerns a fund of $56,250 in the Treasury of the United States, being the undistributed balance

of an indemnity of $385,000 received by the Secretary of State from Venezuela in ten equal annual instalments, beginning in September, 1909, for the benefit of the Orinoco Company, Limited, and its predecessors in interest, to settle and discharge all claims against Venezuela arising out of the illegal annulment of a certain concession, ouster therefrom, and confiscation of valuable property thereon. At the time of the ouster title to the concession was in the Limited Company, by mesne transfers from the original grantee.

Appellee, the Orinoco Iron Company, was lessee of the Limited Company for the remainder of the term of the concession; was in possession at the time of ouster and actively engaged in mining operations thereon; had expended approximately $175,000 in exploiting and operating the iron mines, for machinery, etc., and sustained large property losses, in excess of the indemnity, when ousted and its property and rights were confiscated by the Venezuelan authorities.

The Iron Company filed its bill in the Supreme Court of the District of Columbia setting up that the claim against Venezuela for indemnity was filed without its knowledge; that in the Memorials of the Orinoco Company, Limited, and its title holder, the Orinoco Corporation, addressed to the State Department in the matter, these companies relied on the operations of the appellee to show full compliance with the terms and conditions of the concession and wrongful annulment; that said companies fraudulently misrepresented to the State Department, and through it to Venezuela, that all of the property and rights confiscated were then the property of the Limited Company and its said title holder; that they and their predecessors in interest were the only persons or concerns injured or affected

by the illegal ouster, confiscation of property, and annulment of the concession; that the property and rights of appellee, as lessee, were ignored and fraudulently concealed by them in the negotiations for indemnity; that said indemnity was based largely if not entirely on appellee's losses in property and rights; and that in consideration of the payment of said indemnity Venezuela received from the United States the full release and discharge from all claims, customary in such transactions between nations, and in addition a relinquishment of title to Venezuela of the property and rights of appellee. In these circumstances, appellee claimed in and by its said bill, an equitable interest in, and lien on, said balance in the Treasury to the full extent thereof, and prayed for an injunction to restrain the Limited Company and John W. LeCrone, Receiver, from receiving said balance from the Treasury, and the officials of the Treasury from paying same over to them, and to require the Treasury officials, on final hearing, to pay same to a receiver to be appointed in the cause.

The Secretary of State of the United States, pursuant to the Act of Congress of February 27, 1896 (29 Stat. 32), providing for the disposition of moneys received from foreign governments in trust for citizens of the United States, undertook to distribute the award made by Venezuela as aforesaid in accordance with an arrangement entered into by the several companies named in the protocol of settlement between the two countries, by which the beneficial interest of the Orinoco Company, Limited, in said award, fixed at $75,000, was to be paid to one John W. LeCrone, who had been appointed receiver of said company, by a county court in Minnesota, at the instance of one Bax-

ter, attorney, secretary and a director of said company, who had obtained a default judgment for about $90,000 against his said company (a Wisconsin corporation) for alleged attorney fees.

The record shows that the Iron Company had applied to the Secretary of State to share in said award, to the extent of the expenditures incurred by it in an attempt to mine the iron deposits on the concession aggregating $174,908.47, but that the State Department, following its settled practice in distributing moneys received from foreign governments under said Act of February 27, 1896, had refused to consider any but the *prima facie* beneficiaries (*i. e.*, those named in the protocol of settlement), holding that parties, like the Iron Company, claiming adversely or asserting equitable liens upon the fund, should seek their remedy in the courts, but at the same time giving all such parties, including the Iron Company, ample notice of his proposed distribution so that they could take appropriate action for their protection.

The Supreme Court of the District of Columbia sustained plaintiff's claim of equitable title to the aforesaid balance of said fund in the Treasury (Rec., 55), and enjoined the defendants, the Orinoco Company, Limited, and its said receiver, LeCrone, from asserting any title to said moneys and making any demand or claim therefor on or against the United States, or any officer thereof, and also enjoined the defendants, the Secretary of the Treasury and the Treasurer of the United States, from delivering any warrant or order for payment of said moneys to any person *except to the receiver appointed by the court in this cause.* (Rec., 60, 61.)

Said decree further provided (Rec., 61-62) that said Treasury officials—

> "be and they hereby are directed and enjoined to pay forthwith into the hands of the receiver hereby appointed in this cause, the aforesaid moneys, and said receiver is hereby authorized and directed to execute and deliver a due acquittance and release to said officials of the Treasury Department upon receipt of payment of said moneys."

The Court of Appeals affirmed this decree in its entirety (52 Wash. Law Rep. 210), the late Chief Justice Smyth delivering the opinion of the court and Justice Van Orsdel concurring therein. Judge Smith, of the Court of Customs Appeals, who sat in the case, dissented "in so far as the opinion affirms the judgment of the lower court enjoining the Secretary of the Treasury," but concurred in the affirmance of the decree in all other particulars.

In their respective answers to plaintiff's bill, the Limited Company, and its said receiver, LeCrone, contended that the Iron Company had not complied with the terms of its contract with the Limited Company, and had voluntarily abandoned the same, and, moreover, that said contract had been duly forfeited, and also that the Iron Company had not expended exceeding $75,000 in its operations under its contract.

In disposing of these contentions, the Court of Appeals said:

> "The [trial] court found that the Iron Company was prevented from going ahead with the performance of its contract by the action of the government of Venezuela, by revolutions and other occurrences over which it had no control, that the making of the award embodied in the protocol was based on these facts, and that the Limited Company could not question them; also that the Iron Company was

always ready, able and willing to perform the contract, and was not in default, that it had spent a very much larger amount than the remainder of the award then in the Treasury, and that it was entitled to a decree for the remainder. A decree was entered for that amount, subject to an attorney's lien, which is of no importance here.

"The record makes it very clear that the Iron Company was ready, able and anxious to proceed with the development of the property; that it had expended about $175,000 for that purpose; that it was prevented from proceeding with its work by the revolutionists at first, and then by the government of Venezuela; that there was no basis for the claim of the Limited Company that the Iron Company had failed to perform its contract in any respect, and that its declaration that the Iron Company had forfeited the contract was futile; that all its [the Iron Company's] property, including 3,000 tons of ore ready for shipment and the right to a very large deposit of ore containing several hundred thousand tons were confiscated by the Venezuelan government; that the Limited Company wrongfully represented to the Venezuelan government that the property and right belonged to it when taken, and that it was entitled to receive compensation therefor; that, relying upon this representation, Venezuela made compensation for the wrongs enumerated, and that in the $385,000 which Venezuela paid on that account was included the value fixed by the protocol upon the property and right just mentioned. In view of this we are convinced that the Iron Company has a lien *ex maleficio* upon the balance of the award in the Treasury of the United States. It would be contrary to equity if the Limited Company should be permitted to enjoy the portion of the award which it secured by its wrongful representations." (Citing Pomeroy on Equity Jurisprudence, sec. 155.)

In Judge Smith's view it was unnecessary to enjoin the Secretary of the Treasury "since the court had jurisdiction of the receiver and of the beneficiaries in this case and had the power to enjoin them from receiving the moneys and the power to compel the transfer of the balance of the fund to those entitled to receive it."

GROUNDS OF THIS MOTION TO DISMISS OR AFFIRM.

One aspect of this case was before the court at its last term. We refer to the appeal of the Orinoco Company, Limited, and John W. LeCrone, receiver (No. 1018, October Term, 1923), which was docketed and dismissed by this court on May 12, 1924, and a motion to reinstate which was denied on June 9, 1924, the mandate therein being sent down to the Court of Appeals of this District on June 19, 1924.

Notwithstanding the fact that, by said action of this court, the decree of the Supreme Court of the District of Columbia establishing title in the Orinoco Iron Company to the balance of the fund in the Treasury, amounting to $56,250, which is the subject-matter of this suit, has become absolute and final as against the adverse claimants thereto, including the Orinoco Company and LeCrone, receiver, and notwithstanding the legal title to said moneys has been transferred by operation of law, to receiver Proctor, the Treasury officials have insisted upon the prosecution of their appeal to this court.

We ask that the appeal of the Secretary of the Treasury and Treasurer of the United States be dismissed or the decree affirmed for the following reasons:

(1) The appeal of the Treasury officials is frivolous, in view of *Houston v. Ormes*, 252 U. S. 468, wherein this court, after a careful review of the cases, sustained the jurisdiction of the Supreme Court of the District of Columbia, through a mandatory writ of injunction or a receivership, to control the ministerial duty of payment imposed by statute upon the Secretary of the Treasury, in the interest of one having a superior equitable claim to a fund in the Treasury, and expressly approved such practice.

(2) The decree of the Supreme Court of the District of Columbia in this case now having become final insofar as it established the right of the Orinoco Iron Company to the balance of the fund in the Treasury, and effectuated the transfer of the legal title to Proctor, receiver, through the action of this court at the last term in dismissing the aforesaid appeal of the Orinoco Company, Limited, and its Minnesota receiver, LeCrone, that part of said decree which enjoins the Treasury officials from paying said money over to any person other than Proctor, the receiver appointed in this cause, and directs them to pay the same to said receiver, merely requires the Treasury officials to do what it is their plain duty to do in view of the transfer of the title to said moneys effected by said decree, and what it is absolutely necessary they should do in order to give the United States a good acquittance. (*United States v. Borcherling*, 185 U. S. 223.)

ARGUMENT.

I.

HOUSTON v. ORMES IS CONCLUSIVE AS TO THE AUTHORITY OF THE TRIAL COURT TO ENJOIN THE SECRETARY OF THE TREASURY TO PAY OVER THE FUND TO THE RECEIVER IN THIS CAUSE.

The errors assigned by the appellants present for review but one substantial question, namely, whether the court had jurisdiction to grant a mandatory injunction against the Treasury officials to pay this money over to Proctor, receiver in the cause, after finding that appellee had an equitable interest in and lien upon said fund to the full extent thereof. It will be apparent upon reading of the Act of Congress quoted below, that the duty of the Secretary of the Treasury with regard to payments thereunder is merely ministerial. And as hereinafter pointed out this is conceded by the appellants.

This question has already been decided by this court, as heretofore shown, and it is therefore surmised that the real purpose of the Treasury officials in prosecuting this appeal is to secure, indirectly, a reversal of this court's decision in *Houston v. Ormes*, 252 U. S. 468.

The Act of Congress, approved February 27, 1896 (29 Stat. 32), [redacted] provides:

> "Hereafter all moneys received by the Secretary of State from foreign governments and other sources, in trust for citizens of the United States or others, shall be deposited and covered into the Treasury.
>
> "The Secretary of State shall determine the amounts due claimants, respectively, from each of such trust funds, and certify the same to the

Secretary of the Treasury, who shall, upon the presentation of the certificates of the Secretary of State, pay the amounts so found to be due.

"Each of the trust funds covered into the Treasury as aforesaid is hereby appropriated for the payment to the ascertained beneficiaries thereof of the certificates herein provided for."

The answer to a rule to show cause filed in this case on behalf of Secretary Mellon and Treasurer White (Rec., 56), sets up two objections to the jurisdiction of the court:

1. That the authority conferred upon the Secretary of *State* by the Act of February 27, 1896, providing for the distribution of moneys received from foreign governments, to determine the beneficiaries of any such funds, is not subject to judicial control. (Rec., 58.)

This point may be conceded, because no decision or action of the Secretary of State is sought to be reviewed or controlled in this suit. Only the confessedly ministerial act of payment by the Secretary of the Treasury, upon the certificates issued by the Secretary of State, is covered by the decree. (Rec. 60-62.) It will be noted that the Secretary of State was not made a party to this suit.

2. The second defense set up in said answer of the Treasury officials is that "the complainant seeks to enjoin these defendants from the performance of *a plain ministerial duty imposed by statute*, which said defendants are to perform in compliance with the mandate of the said Act of February 27, 1896." (Rec., 59.)

The answer to this latter contention is that in *Houston v. Ormes, supra,* this court expressly decided that *"a plain ministerial duty imposed by statute"* upon

the Secretary of the Treasury, to pay a party named therein a certain amount of money, could be controlled by the Supreme Court of this District, in the interest of one having a superior equitable claim to the fund.

As stated by Chief Justice Smyth, in delivering the opinion of the Court of Appeals in this case, the duty to pay imposed upon the Secretary of the Treasury is no more direct and positive in this case than in *Houston v. Ormes.*

The mandate of Congress involved in the Houston case was that the Secretary of the Treasury should pay Susan Sanders so much money. The mandate of the statute involved in this case is that the Secretary of the Treasury shall pay to the persons designated in the certificates of the Secretary of State the amount designated therein. Clearly, no more sanctity attaches to the certificate of the Secretary of State in this case than attached to the direct mandate of Congress involved in the Houston case. It is "a distinction without a difference," so far as concerns the authority of the courts of this District to control the ministerial duty of paying out in the interest of one having a superior equitable title to the fund.

Manifestly, in this case, the only thing for the Secretary of the Treasury to be concerned about is that he receive a good acquittance. This he can get by paying the receiver in this cause, because not only the party designated as receiver of the moneys in the certificates of the Secretary of State (John W. LeCrone, the Minnesota receiver), but the Orinoco Company, Limited (the real beneficiary under the award), were both made parties to this suit and were not only served by publication but appeared and defended on the merits, and,

as above stated, the decree of the Supreme Court of the District of Columbia establishing the title of the Orinoco Iron Company to said money, as against said parties, has now become final.

It may be noted, in this connection, that Judge Smith of the Court of Customs Appeals, who sat in this case in the Court of Appeals, while expressing the view that the decree of the trial court should be modified so far as it enjoined the Secretary of the Treasury, added:

> "The court had jurisdiction, however, of the receiver and the beneficiaries in this case and had the power to enjoin them from receiving the money and the power to compel the transfer of the balance of the fund to those entitled to receive it."

The judges of the Court of Appeals were therefore united in upholding the jurisdiction of the Supreme Court of the District of Columbia over the receiver, LeCrone, and the real beneficiary of the award (the Limited Company), and also agreed as to the power of the trial court "to compel the transfer of the balance of the fund to those entitled to receive it."

It is apparent, from reading Judge Smith's opinion, that he failed to distinguish between the jurisdiction of the trial court with respect to the *ministerial duty of paying* imposed upon the Secretary of the Treasury, and its power, or rather lack of power, with respect to the *quasi-judicial duty of ascertaining the beneficiaries to the fund* imposed upon the Secretary of State, as he says:

> "Indeed, if it be true that the Secretary of the Treasury can be enjoined from making the pay-

ments directed by the Secretary of State, *then as a corollary of that proposition* it would seem that the findings of the Secretary of State may be controlled and directed by the judicial department of the Government."

This statement shows how utterly Judge Smith failed to grasp the purport of *Houston v. Ormes*, where this court said (252 U. S. 473):

"In the present case it is conceded, and properly conceded, that payment of the fund in question to the defendant Sanders is a ministerial duty, the performance of which could be compelled by mandamus. But from this it is a necessary consequence that one who has an equitable right in the fund as against Sanders may have relief against the officials of the Treasury through a mandatory writ of injunction, or a receivership which is its equivalent, making Sanders a party so as to bind her and so that the decree may afford a proper acquittance to the government. The practice of bringing suits in equity for this purpose is well established in the courts of the District. Sanborn vs. Maxwell, 18 App. D. C. 245; Roberts vs. Consaul, 24 App. D. C. 551, 562; Jones vs. Rutherford, 26 App. D. C. 114; Parish vs. McGowan, 39 App. D. C. 184, s. c. on appeal McGowan vs. Parish, 237 U. S. 285, 295. *Confined, as it necessarily must be, to cases where the officials of the Government have only a ministerial duty to perform, and one in which the party complainant has a particular interest, the practice is a convenient one, well supported by both principle and precedent.*"

The Court of Appeals, in its opinion in this case, said:

"It is provided by statute (29 Stat. 32) that moneys received by the Secretary of State from

foreign governments in trust for citizens of the United States shall be covered into the Treasury, and that the Secretary of State shall determine the amounts due claimants, respectively, from the trust fund, and certify the same to the Secretary of the Treasury, who shall, upon the presentation of the certificates, pay the amounts so found to be due. The Iron Company requested the Secretary of State to recognize its claim and pay the amount thereof out of the fund received from Venezuela. This request was denied by the Secretary on the ground that the claim was cognizable by the courts rather than by the Department of State, and that according to the uniform practice of the Department parties holding claims like that of the Iron Company against a trust fund in the Treasury were remitted to the courts for the enforcement of their rights.

"Appellants, including the Treasury officials, point to the statute, which says that the Secretary of the Treasury 'shall, upon the presentation of the certificates of the Secretary of State, pay the amounts so found to be due,' and urge that the courts have no power to direct the Secretary of the Treasury to pay to any person other than one holding a certificate of the Secretary of State. We think this is a misconception of the law. A question quite similar to the one thus presented was passed upon by this court in *McAdoo v. Ormes,* 47 App. D. C., 364, 46 Wash. Law Rep., 101. Our decision was taken to the Supreme Court of the United States on appeal and was there affirmed. In that case Congress, in an appropriation act, had directed the Secretary of the Treasury to pay to claimants in the act named the several sums appropriated therein. Among those named was one Sanders. It will be noticed that the direction to the Secretary of the Treasury to pay to the claimant the amount appropriated was fully as direct and

positive as the direction in the statute which we are considering. One Lockwood instituted a suit in the Supreme Court of this District to establish an equitable lien on the fund appropriated to Sanders, who was made a defendant, together with the Secretary of the Treasury and the Treasurer of the United States. There was a final decree adjudging that a certain sum was due from Sanders to Lockwood, and appointing a receiver to collect from the Secretary of the Treasury the amount involved, and directing the Secretary to pay the same over to the receiver. The Treasury officials challenged the jurisdiction of the court upon substantially the same grounds as those set forth in this case. In denying the soundness of their position the court said that the payment of the fund in question to the defendant Sanders was a ministerial duty, the performance of which would be compelled by mandamus. 'But from this,' continued the court, 'it is a necessary consequence that one who has an equitable right in the fund as against Sanders may have relief against the officials of the Treasury through a mandatory writ of injunction, or a receivership which is its equivalent, making Sanders a party so as to bind her and so that the decree may afford a proper acquittance to the Government. The practice of bringing suits in equity for this purpose is well established in the courts of the District.' *Houston v. Ormes*, 252 U. S., 469, 473, in which many cases are cited.

"Here the Iron Company has an equitable right in the fund as against the Limited Company and LeCrone, and therefore has a right to relief, as Lockwood had, against the officials of the Treasury, through the proceedings which have been taken. We do not think the matter is open to further discussion."

We submit that, as stated by the Court of Appeals, this case cannot be distinguished from *Houston v.*

Ormes. It is worthy of note, in this connection, that Judge Smith, of the Court of Customs Appeals, in dissenting on this branch of the case, made no effort to distinguish *Houston v. Ormes* and cites no authority for his view, although he concedes that the payment by the Secretary of the Treasury to the beneficiaries ascertained by the Secretary of State, is merely a ministerial function.

II.

UNDER UNITED STATES v. BORCHERLING, 185 U. S. 223, IT IS THE DUTY OF THE SECRETARY OF THE TREASURY TO TAKE NOTICE OF THE TRANSFER OF TITLE EFFECTED BY THE FINAL DECREE OF THE SUPREME COURT OF THIS DISTRICT IN THIS CASE AND PAY ACCORDINGLY, IN ORDER TO GIVE THE UNITED STATES A GOOD ACQUITTANCE.

The Borcherling case established the principle that where the Secretary of the Treasury is charged by statute with the payment of money, it is his duty to recongnize a decree of a court of competent jurisdiction transferring title to said moneys from the beneficiary under the statute to a receiver appointed in the cause, and pay only to said receiver, otherwise the obligation of the United States will not be discharged. Said case further holds that where, in disregard of such transfer by operation of law, payment is made to the beneficiary under the statute, such payment is no defense to a suit by said receiver against the United States in the Court of Claims to recover the amounts so illegally disbursed.

It follows therefore that the decree of the Supreme Court of the District of Columbia in this case, insofar as it enjoins the Treasury officials to pay the moneys

in question over to the receiver appointed in this cause, should be affirmed, because it merely commands them to do what it is their plain duty to do, having knowledge of the transfer of title to said money effected by said decree.

III.

The Present Position of the Treasury Officials in This Matter Inconsistent With That Formerly Taken and Not Justified by Developments.

It is also to be noted, in this connection, that the predecessor of the present Secretary of the Treasury heretofore resisted mandamus proceedings brought by said LeCrone, as receiver of the Orinoco Company, Limited, to compel said Treasury official to pay over the money in question to him as said receiver, on the ground of the pendency of this and another suit in the Supreme Court of the District of Columbia concerning this award (*LeCrone v. McAdoo,* 48 App. D. C., 181).

The Court of Appeals, in its opinion in that case, stated the facts thereof as follows (*Ib.,* pp. 181-182):

> "The appellant, John W. LeCrone, is the receiver of the Orinoco Company, Limited, having been appointed by a Minnesota court. As such receiver he claimed a fund of $56,250 in the hands of the Secretary of the Treasury, and applied to the lower court for a mandamus to compel its payment to him. The Secretary answered that the fund was claimed by two other parties in suits commenced by them on the equity side of the Supreme *swered to the merits in those cases,* and that they Court of the District; *that the appellant had an-*

were still pending. The Secretary further answered that he should not be required to pay out the fund *until the controversy between the appellant and the plaintiffs in those suits was finally determined so that he might disburse it with entire safety to the United States.* To this answer appellant demurred. The demurrer was overruled, and the appellant refusing to plead further, his application for the writ was dismissed."

In affirming the action of the lower court in that case, denying the writ of mandamus against the Secretary of the Treasury, the Court of Appeals said (*Ib.* p. 186):

"Appellant asserts in argument that the Supreme Court of the District, in the suits just mentioned, has no power to enjoin the Secretary of the Treasury from paying out the fund; that it does not appear that the court has jurisdiction of him as receiver; that the Minnesota court has exclusive control of the administration of the fund; and that consent has not been given by that court to the institution of the equity suits.

"The Supreme Court of the District is a court of general jurisdiction, and has full power to dispose of all the questions raised by the appellant, or which he may hereafter raise, and to grant him complete relief with respect to every right which he may have to the fund in controversy. About this we do not understand that there is, or can be, any debate. Under these circumstances he is not entitled to the writ of mandamus."

A writ of error sued out from this court in that case by LeCrone was dismissed because of his failure to substitute the successor of Secretary McAdoo (*LeCrone v. McAdoo,* 253 U. S., 217). In disposing of that writ of error, Mr. Justice Holmes, speaking for the court, said (253 U. S. 218):

"The theory of the answer [of the Secretary of the Treasury] seems to be that the purpose of the Act of Congress was to appropriate a fund to the claim and to transfer the claim to that fund, leaving the question of title open to litigation in the ordinary courts, as has been held in more or less similar cases. *Butler v. Goreley,* 146 U. S. 308, 309, 310; Id., 147 Mass. 8, 12; *United States v. Dalcour,* 203 U. S. 408, 422; *Robertson v. Gordon,* 226 U. S. 311, 317. See, also, *Bayard v. White,* 127 U. S. 246. It is thought that Congress hardly can have sought to confer judicial powers upon the Secretary of State. *United States v. Borcherling,* 185 U. S. 223, 234. And as the certificates are not gifts but are in recognition of outstanding claims, *Williams v. Heard,* 140 U. S. 529, reversing s. c., 146 Mass. 545, judicial action is supposed to be necessary for the final determination of the right."

In view of the action of the predecessor of the present Secretary of the Treasury in successfully opposing the mandamus proceedings brought by LeCrone, the Minnesota receiver, by showing that the courts of this District *had* jurisdiction of this controversy and that a final determination thereof was necessary to the due protection of the United States, it hardly seems becoming of the present Secretary to resist, in this suit, and by successive appeals, the very jurisdiction which his predecessor had urged in opposing LeCrone's application, especially in view of the decision of this court in *Houston v. Ormes* covering the very point of jurisdiction which he now raises. At least the Secretary "well might have remained satisfied" with the well reasoned decisions of the two lower courts. (*Edwards, Collector, v. Slocum,* 264 U. S. 61, 62.)

This change of position on the part of the Secretary of the Treasury has been of considerable moment to

appellee because it has enabled the unofficial appellants to prosecute their appeals, both to the Court of Appeals and this court, without giving a supersedeas bond, fixed by the trial court at $10,000, to cover interest on the fund, because of the statute exempting the head of a Department of the Government from such requirement.

As the matter now stands, the Secretary of the Treasury is insisting on paying the money in question over to the agent of the party who has been adjudged guilty of perpetrating a fraud upon the Iron Company and held not entitled to receive the same.

IV.

Application of Rule 23.

Because of the frivolous nature of this appeal, especially after final determination of the litigation between all of the parties in interest, and because of the large losses in interest caused to appellee by the delay due to the appeal of the Treasury officials, it is submitted that this is a proper case for the application of Rule 23 of this court and the imposition of interest from the date of the decree, it being a decree for the payment of money. (*Smith, Auditor, v. Jackson,* 246 U. S. 388.)

CONCLUSION.

It is submitted, therefore, that the appeal should be dismissed or the decree of the court below affirmed, with interest and costs to appellee.

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Please see also Reply Brief for Appellee in answer to Solicitor General's Brief.